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FEDERAL APPELLATE JUSTICE IN 1973*

Roger C. Cramton†

Two of the nation's leading jurists and two of its outstanding law professors discussed the quality and structure of federal appellate justice in the 1973 four-part Irvine Lecture Series at the Cornell Law School. The series contributed to a growing public discussion of the problems encountered as federal appellate courts, including the Supreme Court, have faced mounting workloads. The four lecturers were Professor Maurice Rosenberg of the Columbia University Law School, Judge Clement F. Haynsworth of the United States Court of Appeals for the Fourth Circuit, Professor Philip B. Kurland of the University of Chicago Law School, and Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit.

The backdrop for the series was the increasing difficulty that appellate courts have had in handling the flood of appeals in recent years. Within the last decade, the number of appellate cases in the federal courts alone has risen from about 5,000 to 15,000 per year. A more affluent and larger population has committed many new and complex issues to the courts such as civil, environmental, and consumer rights cases. Moreover, the number and proportion of criminal appeals has risen at an explosive rate. The increased case load has required federal appellate judges not only to increase their individual output, but to adopt various screening and other procedural devices in order to stay abreast of the tide. Delay has

* The Board of Editors of the Cornell Law Review wishes to express its appreciation to two of its members, Thomas E. Myers and Archie T. Wright, III, for their assistance in the preparation of the following Articles.

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nevertheless increased and these valiant efforts may themselves have affected the quality of the appellate process.

The four lecturers in the series agree that the federal courts of appeals and the Supreme Court are faced with massive and growing workloads that cannot be handled adequately by present manpower and techniques under existing jurisdictional rules. There is agreement that a major current problem is undue delay in the disposition of appeals. The time required for disposition of civil appeals has grown to nearly two years in several courts of appeals. Although the record is better in criminal cases, growing backlogs and resultant delays are being encountered here also. The purposes of the legal system are hampered and a litigant's right to appeal threatened by such undue delay.

A second and widely shared concern involves the quality of the decisional process as the courts of appeals and the Supreme Court adopt assembly-line techniques to deal with massive case loads. Oral argument has been reduced in most courts and eliminated entirely in a large portion of cases in some jurisdictions. The growth of court personnel engaged in screening and analyzing cases has given rise to fears that the judicial process is being bureaucratized, with the consequent loss of the element of personal decision that traditionally has characterized the Anglo-American judicial process. The commendable efforts of the courts to expedite decision and increase court productivity, some fear, may have affected the quality of the decisional process. Thus, Professor Kurland spoke of the inability of the Supreme Court Justices to set aside adequate time for reflection, personal research, and collegial exchange on the difficult issues before the Court.

A third major concern involves the current methods of handling criminal appeals and prisoner petitions challenging state and federal convictions. Finality and dispatch in criminal cases have been bled out of the federal appellate process, resulting in a large, repetitive, and often frivolous body of appeals crowding the dockets. Several alternative methods of dealing with the problem are advanced. Judge Haynsworth, whose lecture concentrates on this issue, proposes a new national tribunal which would provide each criminal defendant with a single, direct opportunity to raise federal constitutional questions, thus eliminating these cases from lower federal courts and the Supreme Court. Judge Friendly, on the other hand, opposes the Haynsworth remedy as unnecessary and undesirable, arguing that various statutory proposals to rein-

introduce finality to criminal decisions would accomplish the same purpose in a better fashion.

There is dispute concerning the significance of a fourth problem—lack of stability and evenhandedness in federal law. Professor Rosenberg argues that the growth in the size of the federal courts of appeals, which have as many as fifteen appellate judges on a single court, and the inability of the Supreme Court to resolve all of the conflicting decisions of lower courts because of time pressure, have resulted in uncertainty, instability, and a lack of uniformity of federal law. Litigants are treated differently by different panels of the same courts of appeals and by courts of appeals sitting in different parts of the country. Uncertainty concerning important questions of law also encourages relitigation of the same question in different courts and increases the burdens at all court levels by generating a continuous flow of new lawsuits throughout the country. Professor Rosenberg and Judge Haynsworth conclude that the increasing instability of federal law warrants major structural revisions of the federal appellate system, including the creation of a new tribunal under the Supreme Court. Judge Friendly, on the other hand, while agreeing that the Supreme Court is unable to resolve all intercircuit conflicts, concludes that structural revision would not accomplish the purposes sought and is objectionable because it would create specialized tribunals and result in jurisdictional bickering between the new court and existing courts.

The principal focus of the series is on finding solutions for these vexing and complicated problems. If a system is overtaxed with a workload that it cannot handle adequately, solutions must be found either in reducing the input into the system, increasing its productivity, or revising its structure in a way that contributes to reduced case load or increased capacity. Solutions of all three kinds are discussed by the lecturers.

Judge Friendly is alone in placing sole reliance on proposals to reduce the case load of the overburdened appellate courts. "There is only one way," he said, "to avert the flood, namely, to lessen the flow of cases into the general federal courts by eliminating those that should not be there."

His suggestions include elimination of diversity jurisdiction, limitation of the use of the federal criminal process, containment of tax and patent litigation within specialized systems except to resolve constitutional issues, and severe curtailment of executive branch

dependency upon the federal courts by increasing the fact-finding and enforcement powers of departments and agencies.

Each of the four lecturers expresses concern over the effects of recent procedural and staffing developments in the federal courts on the quality of appellate decisions, but no sharply focused recommendations emerge. Faced with a crushing workload and desirous of preventing undue delay, the federal appellate courts have resorted to screening procedures that utilize law clerks and other court personnel to winnow out frivolous cases from those deserving of more serious attention. Judge Haynsworth defends the use of these techniques of summary disposition as infinitely superior to prolonged delay in all cases. But the lectures do not deal with arguments made with increasing frequency by members of the bar that the courts may not be unerring in their identification of frivolous cases for summary decision and that reliance on screening by a single judge or his law clerk, if oral argument is denied, may result in an effective delegation of decisional authority.

Proposals for structural revision of the federal appellate court system are a principal focus of the lectures by Professor Rosenberg and Judges Haynsworth and Friendly. Professor Rosenberg, who is Chairman of the Advisory Council on Appellate Justice, has developed, with Professor Paul D. Carrington of the University of Michigan Law School, an elaborate proposal for a national division of the federal courts of appeals, which would provide relief both to the circuit courts and the Supreme Court. The new tribunal, which would be composed of judges selected from active circuit judges, would handle types of cases which the Supreme Court, by rule, would prescribe from categories delineated by Congress. Access to the Supreme Court would not be cut off or turned over to the new tribunal, and to the extent possible it would not be structured as a new "fourth tier," with the delay in individual cases that any elongation of the judicial structure would entail. Professor Rosenberg proposes that panels of the new national court deal with claims against the United States, customs and patent appeals, national law specialties such as federal income taxation, conflicts between the circuits, criminal cases in which federal rights were asserted, and perhaps other categories of cases. Judge Haynsworth emphasizes the role of a new national tribunal in providing finality in criminal cases, especially those in which a state criminal conviction or incarceration is under attack, but agrees with Professor Rosenberg that inclusion of other categories of cases, such as intercircuit conflicts, would be desirable.

Judge Friendly, on the other hand, opposes "tinkering at the

appellate level" as inappropriate and ineffective. He argues that Judge Haynsworth's proposal would create a specialized court of criminal appeals which would be "dominated by hard-liners or soft-liners, more likely the former," and which might come into conflict with the Supreme Court's attitudes in the field of constitutional criminal procedure. He also attacks the Rosenberg-Carrington proposal on grounds that it "does nothing to curtail the flow of cases" into the system and would create new problems of jurisdiction and staffing while providing insufficient relief to the courts of appeals and the Supreme Court. Elimination of various categories of cases from the federal courts entirely, in the view of Judge Friendly, would benefit the federal courts at all levels without the creation of new problems.

In January 1974, the Advisory Council of Appellate Justice adopted a modified form of the Rosenberg-Carrington proposal; and in February, the House of Delegates of the American Bar Association adopted a recommendation calling for the

creation by Congress of a national division of the United States Court of Appeals for the purposes of (1) affording relief to the individual circuit courts of appeals, (2) affording relief to the Supreme Court of the United States, (3) affording prompt resolution of legal issues of national concern which the Supreme Court lacks the time to deal with, and (4) promptly eliminating conflicts in the decisions by federal courts below the level of the Supreme Court.

Both the Advisory Council on Appellate Justice and the American Bar Association addressed their recommendations to the Commission on Revision of the Federal Court Appellate System, a new federal commission which is charged by Congress with the development of recommendations for improvement in the structure and procedure of the federal appellate court system.

The 1973 Irvine Lecture Series contributes substantially to public discussion of issues of the structure and quality of federal appellate justice. Prior to the lectures the report of a distinguished group appointed by Chief Justice Burger and led by Professor Paul A. Freund had recommended the creation of a new tribunal which would provide relief to the Supreme Court. This report, which was criticized by bar groups and by the Irvine lecturers, did not address itself to congestion in the courts of appeals and the possible need for earlier resolution of intercircuit conflicts and of other important questions of federal law. The Irvine lecturers make this broader inquiry of problems and possible solutions, and have contributed to the continuing debate on this subject.

PLANNED FLEXIBILITY TO MEET CHANGING NEEDS OF THE FEDERAL APPELLATE SYSTEM*

Maurice Rosenberg†

From time to time in past years we have had rashes of scare stories about the earth being overrun by giant ants, midget Martians, or other visitors who will arrive by saucer. While one ought not be overly casual about such dire prospects, I remain confident that if any of those types set foot—or whatever—on the planet, we'll send them packing, saucers and all. I'm even confident that despite the mushrooming population, radioactive clouds, and everyday pollutants, we'll somehow come through with potable water and breathable air.

The fear that haunts me with a hopeless obstinacy is a nightmare that would cause every lawyer or law student to quake. It is that one morning we will look out the window and see nothing but Federal Reporters rising from the earth to the heavens, shelves and shelves of them, stretching from one horizon to the other. And if the F.2d's can't take over by themselves, they will bring up reinforcements—the N.Y. Supp. 2d's and the emerging third generation of the reporter series.

The rate at which appellate courts are disgorging published opinions is overwhelming, and it shows no sign of slackening. To be quite fair, this is not the West Publishing Company's fault, or even the judges'. The reason the courts turn out the enormous volumes of opinions they do is that they must decide ever more mountainous volumes of appeals. Naturally, the federal courts are in the thick of this problem, as they are in most other sectors of American life; if anything, more so, for the federal courts have been experiencing the shock waves of the litigation explosion more than any other branch of the judicial system.

In conceiving and arranging a series of lectures devoted to

* This Article was delivered as part of the fifty-sixth Frank Irvine Lecture Series at the Cornell Law School on October 8, 1973.

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federal appellate justice, Dean Roger Cramton has drawn attention to this critical problem at precisely the right juncture. Now is the time to find a way of either damming the tide of appeals the federal appellate courts have been receiving, or of devising alternative measures to deal with the controversies that generate the appeals. If we do not, the consequences will be most grave. For one thing, the federal judicial system will probably lose some of its capacity to serve as the major instrument for responsive and responsible change in our society, a role it has filled for a generation with mainly good results. That would be a calamity.

In succeeding lectures you will be hearing Chief Judge Clement F. Haynsworth, Professor Philip Kurland, and Judge Henry J. Friendly describe the multitude of problems and ills that beset the federal appellate court system. They will also of course be offering their prescriptions for palliation or possible cure of these abundant ills. My immodest purpose here is similar.

However, I am not under any illusion that the measures I shall discuss are likely to be a "cure." My actual purpose is to suggest a new strategy or approach to the problems and pathologies of the system. For when one starts working to improve the administration of justice, one soon learns that the diseases develop immunities and spin off new strains faster than the reformers can count them, let alone cure them. Correspondingly, zealous reformers are prone to multiply remedies faster than the patients can absorb them. Happily, the three speakers who will follow me at this podium will offer several of the best and most promising remedies yet advanced.

Chief Judge Haynsworth has produced a very thoughtful proposal to meet the problem in its largest manifestation—the flooding of the federal courts by thousands of collateral attacks on criminal convictions that in the main were rendered by state courts. He suggests creating a new tribunal, just below the Supreme Court, to make final decisions in appeals raising collateral issues, and also in those dealing with prisoners' complaints of illegal treatment in custody.

Then comes Professor Kurland, whose lecture title suggests that he will train his thoughts on the need to change the jurisdiction of the United States Supreme Court itself. He will doubtless examine the plan (which I believe he supports) to have the Supreme Court devote itself entirely to functioning as a continuing constitutional convention. This would mean the high Court would forego deciding disputes involving the application of national statutes and the review of actions by regulatory agencies. The Court's

fare would be a diet of constitutional questions, presumably with some other tribunal or tribunals deciding the nonconstitutional issues of national law.

Former Chief Judge Friendly has developed a thorough, brilliantly articulated, overall plan designed to improve the lot of the entire federal judicial system including, of course, the courts of appeals. His basic idea is to divert the diversity cases from the federal courts, along with a substantial volume of other classes of disputes. In addition, he proposes creating specialized courts to dispose of esoteric types of controversies the United States Courts of Appeals now digest at a considerable cost in juridical dyspepsia.

While each of those programs is imaginative and insightful, each raises for me its own set of problems. Yet it would hardly be fair to attack these brain children prenatally, *en têtes ses pères*. Except for a passing comment, I shall therefore leave their presentation to their authors and their challenge to you.

My sole observation about them is that none builds in the essential element that transcends all particulars: flexibility. To work effectively, a sound plan must make allowance for adaptability to changed circumstances that will surely come. Recent history teaches that the most predictable characteristic of the workload of the federal judicial system has been the certainty of kaleidoscopic changes. These require rapid and flexible responsiveness. The ideas I shall now outline stress that feature.

Professor Paul D. Carrington of Michigan has had either the dominant or a major part in the development and refinement of these thoughts. Other members of the Advisory Council for Appellate Justice, particularly Judges Shirley M. Hufstедler of the Ninth Circuit and Harold Leventhal of the District of Columbia Circuit, have been immensely helpful in their comments and criticisms. Of course, those generous friends deserve no blame for any statements I utter.

I

THE FLOOD OF APPEALS

A survey of federal appellate justice over the past two decades or so reveals several features that are almost too well-known to require elaboration.

First is the massive upward surge in the volume of cases. This reflects the explosion of suit-filings in the district courts; but the problem is not adequately portrayed by merely the figures on

district court entries. One bleak datum giving added dimension to the problem is that the number of filings in the eleven circuits of the United States Court of Appeals increased in the seven-year period from 1966 to 1973 like the price of potatoes—117.6 percent.¹ Judge John Minor Wisdom has forecast that in seven more years—that is, by 1980—we will have at least a doubling of last year's federal appellate intake of 15,629 appeals.² He has testified before the Commission on Revision of the Federal Court Appellate System that by the end of this decade, the courts of appeals will enjoy—if that is the word—a boom that will raise their load to a level between 30,000 and 40,000 cases.³

Second, there has been a significant change in the composition or mix of the case load. It has tended over time to be made up of a greater share of suits that consume large amounts of judicial time and energy. A markedly higher percentage of criminal suits is producing a higher percentage of appeals. Civil suits of great durability are growing more common and more complicated. From a sociopolitical perspective, the cases have increasingly involved wider, deeper stakes than in the past. Increasingly, they represent collisions of strongly held social attitudes involving large constituencies. Proportionately fewer are the politically bland disputes over narrow private interests. More and more of them are, in the vernacular, federal cases.⁴

Another change is that more and more appeals are brought without the appellant's calculating whether pressing ahead makes sense in terms of the dollar costs. With rising frequency, decisions to appeal disregard money considerations. Often indigent litigants do not have to pay the costs, win or lose; and even when they do, they seem to be more concerned with winning than with net economic advantage. The end result is a dramatically disproportionate surge in the practice of appealing, and it is epitomized by

¹ Percentage computed from DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 11-1 (Table 1) (Preliminary FY 1973).

² Statement of Circuit Judge John Minor Wisdom, submitted to Commission on the Revision of the Federal Appellate System, August 22, 1973 (on file at the *Cornell Law Review*).

³ *Id.* My colleague Herbert Wechsler, who is also a member of the Federal Commission on which Dean Cramton sits, has indicated in our conversations that he does not endorse this gloomy assessment. He has suggested that various changes in federal law—for instance, the ending of the military draft—will tend to flatten the steep upward climb in the volume of federal appellate case population. He foresees little further increase in the coming decade.

⁴ For example, the system of financing public education through local property tax revenues has presented the courts with extremely delicate and complex issues riddled with basic conflicts in economic and human values. See, e.g., *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

these figures: from 1960 to this year, district court case volume increased about 60 percent;⁵ in the same period, appellate filings went up about 270 percent.⁶

The steady worsening of the appellate court picture has not gone unnoticed. The nonjudicial branches of government and private groups have registered growing concern to do something about the existing and foreseeable crisis afflicting the appellate courts. With reference to the Supreme Court's problems, the best known response was the formation of the Freund Study Group by the Federal Judicial Center. Its report⁷ has commanded wide attention and unduly shrill reactions because of one of its recommendations.⁸ Meanwhile, several deservedly acclaimed features of the report have been nearly lost to view.

In 1973, the distinguished Commission on Revision of the Federal Court Appellate System was brought into existence with the dual function of rewiring the federal circuitry and improving the appellate courts' structure and procedures.

Finally, mention should be made of the free-lance Advisory Council for Appellate Justice, which has the active support of the National Center for State Courts and the Federal Judicial Center. The Council is working on a wide range of structural, procedural, and personnel problems to improve appellate justice. Dean Cramton is by common consent one of the outstandingly productive members of both the Federal Commission and the Advisory Council.

A further word is in order to help lend perspective to what follows. The phenomenon of mounting case loads is not novel in this country's experience, either in the state or federal systems. The problem has been recurrent throughout our national development. But just as with population and pollution, so here: quantitative change can at last have vast qualitative impact. The suddenness and sheer mass of the recent growth in the volume of federal court

⁵ See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 108 (Table 15) (FY 1972) [hereinafter cited as A.O. REPORT] (percentage change of FY 1972 over FY 1960 total criminal and civil filings).

⁶ Compare DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 210 (Table B1) (FY 1960), with A.O. REPORT 87 (Table 1).

⁷ STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, FEDERAL JUDICIAL CENTER, REPORT (1972).

⁸ The study group's proposal for a National Court of Appeals has been attacked by former Chief Justice Warren and Justice Brennan among others. See Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 724 (1973). See also Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835 (1973).

cases presents an unprecedented threat to the integrity of the judicial function. A number of observers believe the situation has the earmarks of the overworked term "emergency." I am one of these. For that reason it seems right to inspect at closer range some of the apparent causes and potential consequences of the appeal explosion our courts are experiencing.

II CAUSES

For many years after the first quarter of this century the volume of appealed cases remained relatively stable as the total of federal trials began to swell. However, as noted, beginning in 1966, the growth curve for appeals shot steeply upward, producing in seven years a 117 percent increase in the number of cases filed in the courts of appeals.⁹

The largest single component of the growth was civil rights litigation. This was of course spurred by the legislation of the mid-1960's. The result was an increase in the federal district court intake of these actions from 709 in fiscal year 1964 to over 6,100 in fiscal year 1972.¹⁰ At this time there were also large increases in traditional spheres, such as labor relations, labor standards, social security, marine, patent, copyright, and government contract suits.

In the time period we are considering, the volume of appeals in criminal litigation doubled. Convictions after trial contest rose from about 2,900 to more than 5,500.¹¹ Prisoner petitions zoomed from about 7,500 appealable judgments in the 1965 court year to approximately 15,700 in the 1972 court year.¹²

If other things had been constant, the overall increase in district court volume would have been reflected in a correspondingly sizeable rise of about fifty-five percent in the number of appeals.¹³ In fact, the appellate rate climbed more than twice that rapidly.¹⁴ Several factors were at work.

With respect to noncriminal matters, the classes of cases that

⁹ See note 1 and accompanying text *supra*.

¹⁰ See A.O. REPORT 287 (Table C2); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 218 (Table C2) (FY 1964).

¹¹ See A.O. REPORT 381 (Table D4); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 256 (Table D4) (FY 1964).

¹² See A.O. REPORT 320-23 (Table C4); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 188-90 (Table C4) (FY 1965).

¹³ The total of civil and criminal cases filed in federal district courts has risen 55% between fiscal years 1966 and 1973. See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT II-21, II-40 (Tables 16, 32) (FY 1973).

¹⁴ See note 1 and accompanying text *supra*.

experienced the greatest growth at the district court level were precisely those that are most productive of appeals—the civil rights and labor relations cases. In addition, suits of the new breed, such as environmental and consumer litigation, tend toward complexity. Thus, adding to their tendency to appeal more voluminously is their propensity to require judicial energy output far beyond the “average” case.

Even the old standard types of cases have shown a tendency to become more appeal-prone. The trend has been manifest since 1960. Its cause is uncertain, but one likely factor is the relative decrease in the cost of perfecting an appeal—relative to the amount of money involved.

Not even changing patterns of substantive business account for the steep rise. For example, appeals of private civil judgments on the diversity side have risen about thirty percent in the most recent decade.¹⁵ One searches in vain for changes in the substantive laws of the states or in the nature of the controversies to furnish an explanation for this. We are forced to conclude that there simply is more inclination to appeal a losing judgment, and no sufficient deterrent in the form of expense, fatigue, or other disincentive.

In criminal proceedings, the appointment of counsel to represent indigent accused persons has powerfully stimulated the *rate* of appeal from convictions, boosting it from about twenty-one percent in 1960 to about fifty-four percent in 1970.¹⁶

Restating this message, I would say that the problem of the rise in the appellate case load in the federal courts has both quantitative and qualitative dimensions—the former having to do with the sheer numbers or volume load; the latter, with the amount of work and stress the appellate judges are burdened with. If greater volume simply required raising the tempo of energy consumption—as pressing the car’s accelerator a bit harder does—the problem would not be so serious. But in the courts, the pressure of greater quantity to force speedier dispositions clearly affects quality—at least, the quality of the process.

Of course, the pressure generated by an increase in dispositions by the courts of appeals is transmitted upward and finds reflection in a roughly comparable increase in the numbers of petitions filed in the Supreme Court. Over the last decade the percentage of appellate court losers seeking further review in the

¹⁵ Compare DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 196 (Table C2) (FY 1962), with A.O. REPORT 286 (Table C2).

¹⁶ Goldman, *Federal District Courts and the Appellate Crisis*, 57 JUDICATURE 211, 212 (1973).

Supreme Court has remained constant at between sixteen to nineteen percent.¹⁷ Also constant has been the total number of petitions granted by the Supreme Court. This means that the percentage of court of appeals dispositions experiencing Supreme Court review has steadily declined and is now well below one percent. In ninety-nine percent or more of their decisions, the courts of appeals are effectively the courts of last resort.

In addition to the growth in federal court petitions, the number of petitions coming to the Supreme Court from the highest state courts has also increased substantially. Overall, the number of petitions and appeals from all sources has risen over the past decade from about 2,400 to more than 3,700.¹⁸

True, all these figures must be used with caution because cases present individualistic problems that are not accurately measured in volume figures alone. Many involve relatively simple issues of sufficiency of evidence to sustain guilty verdicts in criminal cases, or insubstantial collateral attacks upon old convictions. Others are complex and time-consuming. That makes the nature of the cases being appealed a critical factor.

Yet after due allowance is made, the fact remains that the machine-gun rapidity with which the Supreme Court Justices are fired upon by certiorari-seeking litigants is dangerous—not so much for the personnel as for the institution. It is not a matter of whether the Justices have more leisure or less leisure for their personal pursuits. One Justice recently put it that the inevitable result of having to decide which of eighty new matters a week to hear and decide is that the litigants and their causes cannot possibly always receive the care which they deserve. Continuing, he observed that the threat is to the work of the Court as an institution. He does not view its importance in terms of effect on the Justices. He said he himself would work just as long and as hard if the Court's docket were cut in half. His concern is for the quality of the product.¹⁹

III OPTIONS

As the number of litigants seeking to use the federal appellate courts rises sharply, the court structure and processes must change in one way or another.

¹⁷ See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 48 n.165 (1973).

¹⁸ See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *ANNUAL REPORT* 178 (Table A1) (FY 1973) (figure for Oct. Term 1962); Supreme Court of the United States, Office of the Clerk, October Term 1972 Statistical Sheet No. 28 (Final), June 29, 1973.

¹⁹ See Burger & Warren, *supra* note 8, at 723.

A possible course is to clamp a ceiling on the number of appeals that are allowed. This expedient entails as a cost surrendering the opportunity to correct a certain proportion of wrong or aberrant decisions that trial courts render from time to time. Fewer decisions reviewed virtually guarantees fewer errors corrected.

Another course—assuming that volume continues to swell, the judge complement stays constant, and the number of appeals is not restricted by reducing the loser's opportunity to seek review of trial decisions—is to introduce procedural changes in the appeal courts. For example, limits may be placed upon the parties' opportunity to make oral arguments. Fewer arguments, shorter ones, or both, may be decreed. Screening devices can be used to sift out appeals that appear to have little merit. A screening committee of one or two judges may be asked to weed out "insubstantial" appeals by rendering summary decisions at the threshold. This avoids employing the full three-judge panel, with obvious economy in judicial effort.

But even if these speed-up measures do achieve an increased rate of disposition, it will be at the cost of changing the nature of the process. There will be less personal contact between judges and cases, more delegation to unseen aides, and less sharply defined responsibility in the judges themselves. The endeavor will probably lose ground in its effort to retain the sense that adjudication is a human and personal experience.

A third option is the obvious one of keeping abreast of increasing workload by augmenting the number of judges. However, this entails the risk of lessening the relative stature and, possibly, power of the position of the court of appeals judge. Justice Frankfurter foresaw risks of this kind when he wrote: "[A] steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system."²⁰ The "depreciation of the judicial currency," he continued, leads to a "consequent impairment of the prestige and of the efficacy" of the courts.²¹

Not all agree that a densely populated bench necessarily sags in its status. But nearly all would have to agree that enlarging the chorus of judicial voices engaged in announcing the law greatly augments the chances of contradictory and confusing signals as to what the law is. There is no ready corrective for this tendency, as is shown by the experience of the bloated Fifth Circuit. To introduce

²⁰ *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

²¹ *Id.*

an overall and singular declaration of the law on especially divisive issues, the fifteen members of that court must sit en banc. Aside from the indifferent success of such full-bench panels in settling the point at issue if the fifteen judges divide sharply, the inefficiency of the practice is staggering. For the occasion, a large group of judges must travel to a single situs from all across the South. The result is to immobilize as many as five panels at one stroke while the judges are traveling, hearing argument, and conferring.

All the remedial alternatives, separately or in combination, are in some measure distasteful, but the most dangerously seductive one is the expansion of the number of judgeships. The pressure toward continual enlargement must constantly be guarded against. For the reasons given—to avoid dilution of status, cacophony in enunciation of the law, and the inefficiencies of oversized complements in a single circuit court—my view is that the principle of “the smaller, the better” is a sound working axiom for federal circuit courts of appeals.

Recognizing that our options are limited, we face the task of choosing the least distasteful blend of arrangements we can achieve in order to cope effectively with an unpredictable, generally increasing demand for the services of those courts. Which blend is least obnoxious depends on our values and priorities with regard to a recognized list of desired or detested attributes of appellate review. These warrant our scrutiny.

IV

JUDICIAL ADAPTATION

Many observers see congestion primarily as a threat to the tradition of personal responsibility of the appellate judges for the fairness and correctness of individual decisions. The primary and universal, although not exclusive, function of appellate litigation is to protect litigants from the misuse of power by trial courts and administrative agencies by subjecting their decisions to review. An important by-product of this function is that it paradoxically reinforces and enhances the power of the reviewed officials, for it raises the litigant's and the public's confidence that the judges of first instance were motivated to decide correctly.

The appellate courts of the United States have performed this universal function of review with unusual success. This may, in

part, be due to a number of features of the traditional process which serve to assure litigants that their grievances have been fully and fairly considered. Among these are that: (1) each disappointed litigant has been assured an opportunity to confront his adversary in oral argument on appeal; (2) the argument has been conducted before a tribunal composed of at least three estimable and independent judges; (3) the judges who decide are generally expected to explain their decisions in sufficient detail to withstand public inspection in the official reports of their proceedings; and (4) each disappointed litigant has been assured an opportunity to address the Supreme Court.

Each of these traditional features has been impaired by the congestion of the past decade. In order to avoid wholly unacceptable delays, the courts have modified substantial aspects of the process envisioned by the traditional expectations in the following manner: (1) oral argument has been abbreviated and sometimes eliminated in the courts of appeals; (2) the regular three-person decisional mechanism of circuit judges has been modified by reducing the panel size to two judges, or by bringing up trial judges *ad hoc* to engage in appellate work; (3) the judges have increasingly relied on the staff work done by their youthful law clerks or other rapidly rotating staff assistants; (4) many decisions are not published; some are not explained in a reasoned written statement of any kind; an increasing fraction are the subject of terse oral dispositions such as "affirmed" or "dismissed"; (5) the amount of attention given by the individual Justices to the petitions of individual litigants seeking to be heard in the highest court has been reduced to the vanishing point. These petitions are now received in such numbers—about eighty each week in the year, on average—that they can be expeditiously handled only by means of heavy reliance on the work of staff of low visibility. Continuation of this tendency risks eroding confidence. Visibility is a substantial requisite for justice since, in the well-worn phrase, it must be seen as well as done. Nonvisibility properly enters the traditional judicial process only at the stage when the known officials deliberate—not to mask the *identity* of the individuals who do the deciding.

V

GOALS

The task is to develop a plan which heeds a number of injunctions rooted in convictions that are as widely shared as

possible. Because of the fragile quality of efforts at court reform, even modest opposition can be fatal; and opposition seems certain to come forth against any plan violating the following constraints. To be acceptable a plan should:

A. *Preserve Channels of Access to the Supreme Court for All Citizens*

Whether vain or improbable, the hope must be allowed to flicker that every person has a right to approach the Supreme Court for redress. This imperative does not require that all Justices actually read and pass upon each and every petition, as long as the channel to the Justices remains visibly open.

B. *Preserve the Supreme Court's Control*

The public apparently holds the Court in awe, whether or not universally in esteem. It opposes "tampering" with the Court. Among those who help shape the public's reaction, some attach great importance to the phrase of the Constitution which commits the federal judicial power to "one supreme Court." Although those who embrace this phrase as a credo agree it does not require the Court to exercise direct authority over each decision in each case, they insist it does require the Court to retain general control over all subordinate institutions.

C. *Give Equal Treatment to Criminal Appeals*

Persons accused or convicted of a crime must be given the level of consideration and procedural opportunity open to civil litigants. This does not require that the treatment of civil and criminal cases be precisely the same. It does imply that any plan that sets up a court to hear solely criminal appeals will be regarded with suspicion if it appears to stamp criminal cases as requiring only second-class treatment.

D. *Preserve the Dignity of Lower Courts*

Although some observers disagree, many are convinced of the importance to our system of maintaining a highly esteemed corps of federal judges who find challenge and fulfillment in their work. Even to those who do not share this view, it must be clear that powerful resistance will be aroused by any changes which demean federal judges by lessening their responsibilities, making their work dull, bureaucratic, or inconsequential, or vastly expanding their numbers. The risk of debasing the currency of judicial office does not require placing a freeze on the number of judgeships, but it does suggest parsimony in creating new judgeships.

E. *Not Elongate the Appellate Process*

Any revamping of the federal judicial hierarchy must be designed to avoid multiplicity of appeals. It will be most difficult to justify a revision which exposes litigants to the costs, tensions, and other burdens of an additional level of review.

F. *Avoid Jurisdictional Bickering*

Few legal disputes are less productive than those over whether this court or another is the appropriate one to decide an issue. Any revision should minimize jurisdictional disputes, not generate them.

G. *Avoid Specialization of Appellate Judges*

An appellate judge should not be assigned duties so narrow that they will repel the ablest judges, or foster a narrow, slit-viewed approach. Moreover, new judicial posts should be furnished safeguards against efforts of special interests to control the process of selecting the judges.

VI

FLEXIBILITY

Besides observing the constraints just outlined, a workable plan for revising federal appellate structures and procedures must have the support of the Justices of the Supreme Court—or, at least, must avoid their opposition. This complicates our task because not all the Justices have stated their views (to say nothing of their votes) on several pivotal matters that will make or break any plan affecting the Court's work. Even if their views were expressed, a court plan should not be hewn in granite, for the Justices' attitudes are subject to revision as experience unfolds and, of course, the membership of the Court will change. These considerations underline the unwisdom of inflexible "solutions." The same concerns argue against adoption of measures to expand lower court judgeships or alter structures by measures that would be hard to recall. A strategy that allows maximum responsiveness not only to presently perceived but to inevitably changing needs seems essential. If flexibility is built into the program, any faulty move can be swiftly corrected.

A flexible approach is exemplified in the well-known and well-used legislation which enables the Supreme Court to make

rules of procedure. The Rules Enabling Act of 1934²² is the primary antecedent; it authorizes the Court to promulgate rules which are subject to congressional disapproval within a specified period.

In the present context, because of the extraordinary importance of the stakes, it is neither wise nor appropriate for Congress to make an open-ended delegation of power over judicial structure and organization, even if there is provision for congressional disapproval. The area within which delegated power to revise structures and procedures may be exercised must be clearly delineated. This power might be assigned to the Supreme Court in the manner of the Enabling Act, perhaps assisted by a standing commission.

Additional flexibility can be achieved through the use of creative methods of court administration. Differential treatment of cases which make differing demands on the diverse functions of appellate courts is possible by utilizing advanced methods of administration. As an example, some state courts have developed effective new means of utilizing professional appellate staffs to reduce administrative burdens on the judges.

Without converting the courts into bureaucracies, the possibility exists that the services of appellate commissioners can be utilized to relieve judges in ways that avoid doing violence to cherished values. Appellate courts can certainly make more effective use of data-retrieval technology to provide better information on which to base the sorting or screening of cases.

Congress must have a role in the flexible program that is urged here. The congressional role should come into play at both ends of the process: at the start, by constructing the basic framework of the revised court structure; at the end, by approving or disapproving the Supreme Court's exercise of its rule-making power in the course of conferring or retrieving jurisdiction in the way it sees the need to do.

VII

ACHIEVING GOALS AND MEETING NEEDS

There follows an abbreviated version of one model of a group of proposals for a revamped intermediate federal court system that is due for consideration by the Advisory Council for Appellate Justice. The point to underline is that this model has not yet been discussed or approved in its specifics by the Council.

²² 48 Stat. 1064, as amended, 28 U.S.C. § 2072 (1970).

This plan for revision of the federal appellate court system tries to respond to four needs: (1) to improve the course of appellate review in criminal cases in order to make the final resolution of these cases a more civilized and rational process than it is now; (2) to harmonize and unify national law in particular subject areas which the United States Supreme Court for quite understandable reasons has not been able to address and settle by rendering authoritative decisions; (3) to provide the courts of appeals with the structure, personnel, other resources, and procedures to enable them to function without the frenetic rush-rush tempo that frustrates the desired personal quality in the review process; and (4) to enable the courts of appeals to aid the Supreme Court in the discharge of its functions, while preserving channels of access to the high court.

Meeting these needs involves creating a capability in the intermediate appellate court system to do the assigned tasks by several means. First is the need to improve the handling of criminal cases. This requires investing in federal judges under the control of the Supreme Court the power and affirmative duty to assure that safeguards guaranteed criminally accused persons by the United States Constitution have been observed and their claims resolved in accordance with the law. As to claims readily raised and fairly reviewed, repetitious collateral attacks can then be foreclosed. With the aid of congressional legislation and within constitutional limits, finality through *res judicata* will be revitalized in criminal cases.

Second is the need to improve the system's capacity to enunciate a unified and harmonious national *corpus juris* in particularly active fields of law. The intermediate federal appellate court system could do this in areas committed to it by the Supreme Court pursuant to congressional authorization. An intermediate court's decisions would be recommendations, not automatically definitive pronouncements.

Third is the task of enhancing the personal quality of review and avoiding mass production-assembly line methods of dispensing justice to a case load of great bulk. This requires either reducing the number of cases or increasing the number of judges working at the intermediate level.

As I noted earlier, the possibilities of reducing the intake of cases into the federal system have been thoroughly canvassed by Judge Friendly. The reductions he has proposed will buy time, but in my view will not preserve for long the functional integrity of the system unless other measures are taken. As we have seen, the

problem at the appellate level is more serious than a mere reflection of the burgeoning number of district court entries. Appeals are increasing at double or triple the rate of the district courts' increase in volume.

A potential way of achieving a reduction in appellate case load is to provide disincentives to appealing. Without violating the tradition that the right of appeal should be generously accessible, serious attention must be given to the question of how would-be appellants can be required to risk something of value as a condition for bringing on appeals wholly lacking in substance. This must be done consistently with due process and fairness.

To aid the Supreme Court in the task of selecting cases for review, the intermediate appellate court need not be given *final* dispositive power to grant or deny certiorari. A division of a reorganized intermediate court of appeals could aid the Supreme Court in its screening function, not by dispatching 400 to 500 cases and rejecting finally the remaining 3,200 or so petitions as suggested by the Freund Study Group. Rather, the intermediate court should be empowered to send forward *all* petitions after formulating carefully the questions presented by the petitioner and stating its recommendations to grant or deny a hearing before the Supreme Court, with reasons.

To achieve some of the values we seek, we shall have to increase the number of judges at the court of appeals level. There are now not quite one hundred authorized. An increase of not more than twenty to twenty-five judgeships could be made without unacceptable risk to the status of the office in the sense which aroused the concern of Mr. Justice Frankfurter.

VIII

A FLEXIBLE MODEL

The implementation of this model of a program for a new approach to meeting the appellate system's needs calls for action by both Congress and the Supreme Court. The plan set out here—for illustrative purposes—features a capacity for flexible response to developing needs. Its essential elements are outlined below.

A. *Consolidation*

Congress by statute consolidates the existing courts of appeals into a unified administrative and jurisdictional system. The unified

entity is called the Court of Appeals of the United States. It merges the eleven existing courts of appeals and erases existing circuit boundaries.

B. *Divisions of the New Court of Appeals*

Congress provides that the Court of Appeals of the United States will consist of a Central Division, a Circuit Division, a Claims Division, and a Customs and Patents Division. The two last-named divisions would carry forward substantially intact the duties of the courts they replace. The Circuit Division is to be divided into as many circuits as appears desirable, giving due recognition to the need to avoid disruption of existing geographic and political arrangements except for good cause. Creating smaller and more numerous circuits raises problems, both political and judicial. Considering the urgency, I think they will be resolved acceptably though not perfectly. The courts in the redrawn circuits carry out their present functions, with this important exception: they do not perform any functions assigned to the Central Division.

C. *The Central Division*

Congress prescribes the basic structure of the Central Division, partitioning it into four chambers or sections. Within defined limits the Supreme Court, under a Rules Enabling Act, sets procedures and gives or withdraws jurisdiction. The following will be the congressionally created sections:

1. *Section for Criminal Appeals*

First is a Section for Criminal Appeals, charged with the duty to grant a searching review in appeals from the highest court of a state or a federal circuit court of appeals affirming a criminal judgment. The purpose is to assure that the defendant's federally secured rights to counsel, freedom from illegal search, arrest, line-up, etc., have been protected. The consequence of the Criminal Appeals section's searching review is to foreclose most issues from collateral attack after assuring that due process has been accorded to the defendant.

This plan presupposes congressional legislation which "res-judicatifies" issues previously heard or disclaimed in an approved and opportune fashion by the court system rendering the criminal judgment. A panel of five or seven Court of Appeals judges, assigned to the Central Division from among qualified sitting judges of the unified court, for three years (or four or five),

and subject to rotation among the sections, would staff the chamber dealing with criminal appeals.

2. *Section for National Law Specialties*

Another panel of judges will function in a Section for National Law Specialties. All cases falling within specified categories or classes of suit will go to this section. The categories will be drawn from a Chinese-menu style list, prepared by Congress and naming such federal specialties as labor relations, social security, environmental protection, antitrust, or whatever fields the Supreme Court regards as most in need of unifying, harmonizing decisions.

Here we come to a key feature of the plan. It is the Supreme Court that determines which three or so classes of cases on the congressional list are most in need of submission to the panel constituting the Section for National Law Specialties. Appeals in the selected categories go directly to this section from the district court or the administrative agency, bypassing the circuit court. The decisions of the section panel in turn go to the Supreme Court *as recommended decisions* for nationwide applicability. For a sixty-day period after the filing of the section's recommended decision the high court has the option to set each of these cases on its own docket. If the Supreme Court declines to do so, the decision becomes final and binding throughout the nation. This ends inter-circuit conflicts and other types of indeterminacy about that issue, as if the Supreme Court itself had spoken.

Two further points are to be stressed. First, Congress, by appropriate legislation, invests the Supreme Court with the described powers. The main enabling statute is one modeled on section 2072 of Title 28 of the United States Code, which is the basis of the Supreme Court's long-standing power to make rules of procedure for the district courts.

Second, the Supreme Court's exercise of its powers under the proposed Enabling Act is subject to the present type of formal approval or disapproval by Congress. This will also hold true for other types of powers granted to the Supreme Court under this proposal. The Court may recall and reinstate any jurisdiction granted to a section of the Central Division as demands slacken or quicken, and as experience shows what works well and what does not.

This is the essence of the concept of planned flexibility. The Supreme Court has its hand on the throttle or the valve

—determining when classes of cases or particular functions shall flow into and out of the Central Division.

3. *Section for Certiorari Review*

Another section of the Central Division can be authorized to perform a limited kind of sifting of petitions to the Supreme Court for certiorari and then to recommend the grant or denial of the writ. Unlike the Freund Study Group's plan, this proposal does not contemplate that the screening panel will have or exercise *final* power to grant or deny any petition.

Instead, it would forward all four thousand (or whatever the total number) of the certiorari petitions to the Supreme Court, in each case stating in summary fashion the issues presented, recommending grant or denial of the petition, and outlining its reasons in the briefest space consistent with clarity. Passage of time (*e.g.*, sixty days) without action by the Justices would give the Central Division's recommendation the stamp of Supreme Court approval.

A recurring question is whether a losing litigant will be permitted to attack recommendations of the Central Division that are transmitted to the Supreme Court. In my view, the answer should be a qualified *yes*. Under the rules the Supreme Court will promulgate to govern petitions and other documents submitted to it, provision can be made that only the papers submitted to the Central Division, the recommended decision of the relevant section of that court, plus a brief motion for rehearing, which succinctly notes the alleged points of error in the decision, will be presented by a petitioner to the Supreme Court.

4. *Section for Referred Cases*

The fourth and final chamber of the Central Division might serve as what has been dubbed a "court of exit" to hear cases the Supreme Court refers to it on an individual rather than categorical basis. These would be cases the Justices believe need decision at the highest level, but as to which they prefer a preliminary decision to be made by the Central Division and transmitted to the Supreme Court with a recommendation. In my scale of priorities, this referral section has only marginal utility compared to the other three chambers.

D. *Selection of Judges*

Selecting judges for the Central Division is doubtless a crucial matter. Both Congress and the President, as well as the Supreme

Court, will take a close look at this feature of the plan before approving it. Still, the problem of how to select the judges can more readily be resolved when the Central Division's functions and procedures are more sharply defined. The manner of selecting judges, including by whom or what combination of officials, is not simple; but it is soluble and should be deferred for now.

An estimated twenty or so new judges will be required if most of the duties outlined here are placed in the Central Division. There are logistical problems involved in the replacement of Central Division judges in their "home circuits" while they are assigned to their special duties. Their personal and financial circumstances will be disrupted if they must sit intermittently for short periods away from home in various Central Division headquarters cities—for example, New York or Washington; New Orleans or Houston; Los Angeles or San Francisco; St. Louis or Chicago. This problem is also difficult, but also soluble in my judgment.

E. *Flexibility*

The flexibility motif is carried through extensively in this proposal, as is apparent. Some may complain the plan is so elastic it is formless. Even if that criticism has some merit, like others it can be met.

CONCLUSION

The flexible approach outlined here—particularly creation of the Central Division—is believed to meet the chief needs of the federal system, not alone as they appear today, but as they may develop. These are: (1) to "res-judicatify" claims of violation of criminal procedural safeguards, thereby reducing the inane stretch-out and repetition that unchecked collateral attacks now permit; (2) to unify and harmonize national law in areas where it is splintered or undeterminable; (3) to aid the Supreme Court in coping with its problem of dealing with an ever-rising tide of certiorari petitions; and (4) to serve as a referral court for the Supreme Court in appropriate individual cases.

By attempting those tasks, the system can remain responsive to changing needs. The Supreme Court can open or close the sluice gates to direct the flow of work as it finds needful. If it wishes, it can drain jurisdiction from inefficacious chambers of the Central Division and reassign their personnel.

In this plan, two features of the Freund Study Group's proposals that caused widespread anxiety are dealt with head-on. The

Supreme Court remains in control of its docket. The channel of access to the Supreme Court—whether a reality or an illusion today—is not blocked by final action of a lower court.

As for the court of appeals judges who will serve in the Central Division, they are given work of consequence and variety. Both their interest and dignity are preserved.

To be sure, this plan has bugs. Exterminating them will be a lively enterprise. But, in truth, I believe it is worth the effort and that the effort will succeed.